

UNITED STATES SENTENCING COMMISSION

Public Access to Sentencing Commission Documents and Data

Federal Register – Vol. 54, No. 238 – Wednesday, December 13, 1989 – Notices – 51279

AGENCY: United States Sentencing Commission.

ACTION: Notice of promulgation of a revised interim policy regarding public access to Sentencing Commission documents and data and solicitation of comments; publication of agreement between the Administrative Office of the United States Courts and the United States Sentencing Commission concerning the confidentiality of certain sentencing information.

SUMMARY: Pursuant to its authority under section 995(a) of title 28, United States Code, the Sentencing Commission promulgates a revised interim policy on public access to Sentencing Commission documents and data set forth below and invites public comment. The Sentencing Commission also publishes the agreement which it entered into with the Administrative Office of the United States Courts on June 22, 1988, concerning the confidentiality of certain sentencing information.

EFFECTIVE DATE: The revised policy on public access to Sentencing Commission documents and data set forth below takes effect on March 15, 1990.

DEADLINE FOR COMMENTS: Comments should be received by the Commission no later than February 12, 1990.

ADDRESS: Comments should be sent to the United States Sentencing Commission, 1331 Pennsylvania Avenue, NW, Suite 1400, Washington, DC 20004, Attention: Public Access Comment.

FOR FURTHER INFORMATION CONTACT: Paul K. Martin, Communications Director for the Commission, telephone: (202) 662-8800.

SUPPLEMENTARY INFORMATION: Section 995(a)(1) of Title 28 authorizes the U.S. Sentencing Commission, an independent commission in the judicial branch of government to establish general policies and promulgate rules and regulations for the Commission as necessary to carry out the purposes of the Sentencing Reform Act of 1984.

On June 21, 1989, the Commission published in the *Federal Register* an interim policy on public access to Commission data and documents and solicited public comment. Comments were generally concerned with two areas: (1) That the agreement concerning the confidentiality of certain sentencing information which the Commission had entered into with the Administrative Office of the United States Courts had not been previously published; and, (2) that under the interim policy source documents are generally unavailable to the public. In response to the first comment, the Commission is publishing its agreement with the Administrative Office. The text of

the agreement is set forth below following the revised interim policy on public access to Commission documents and data.

The Commission has also reviewed its initial determination not to provide public access to source documents such as judgement and commitment orders and plea agreements. The Commission is legally obligated not to provide access to confidential documents and continues to believe that it is under no legal obligation to provide access to other documents. Further, the effort required to provide access to judgement and commitment orders and plea agreements would place an excessive burden on the resources of the agency. It should be noted that the information contained in such documents will be summarized in the datasets which the Commission provides to the Inter-University Consortium for Political and Social Research. These datasets will contain a variety of information about the defendant (though not information which would identify him), the nature of the offense, and the sentence imposed. These datasets will be updated periodically with the addition of new cases. Further, such documents themselves are available from the court of origination.

The Commission has also included in the revised interim policy a provision in part III which makes clear that it may also assemble datasets of other non-confidential information which it has obtained in the course of conducting research, in support of policy development, or in otherwise performing its functions. Such datasets will also be made available to the public through the Inter-University Consortium for Political and Social Research.

Authority: 28 U.S.C. 995(a)(1), Sentencing Reform Act of 1984 (Pub. L. 98-473, October 12, 1984). William W. Wilkins, Jr., Chairman.

PUBLIC ACCESS TO SENTENCING COMMISSION DOCUMENTS AND DATA

I. Introduction: General Purpose and Authorities

Providing public access to non-confidential sentencing information is consistent both with the letter and the spirit of the Sentencing Reform Act of 1984. Among the Commission's duties under the Act is to “establish sentencing policies and practices for the Federal criminal justice system that reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process.” 28 U.S.C. 991(b)(1)(C). As part of that mandate, Congress envisioned that the Commission would “serv[e] as a clearinghouse and information center for the collection, preparation, and dissemination of information on Federal sentencing practices.” 28 U.S.C. 995(a)(12)(A).

Consistent with its clearinghouse function, the Commission is required to provide certain information to the public regarding sentencing in the federal system. Thus, the Commission is responsible for: (a) Collecting systematically the data obtained from studies, research, and the empirical experience of public and private agencies concerning the sentencing process (28 U.S.C. 995(a)(13)); (b) publishing data concerning the sentencing process (28 U.S.C. 995(a)(14)); (c) collecting systematically and disseminating information concerning sentences actually imposed, and the relationship of such sentences to the statutory purposes of sentencing set forth in section

3553(a) of title 18, United States Code (28 U.S.C. 995(a)(15)); (d) collecting systematically and disseminating information regarding effectiveness of sentences imposed (28 U.S.C. 995(a)(16)); and (e) maintaining and making available for public inspection a record of the final vote of each member on any action taken by it (28 U.S.C. 995(e)).

The U.S. Sentencing Commission seeks to carry out its Congressional mandates in a manner that provides for the most efficient use of government resources and is consistent with its agreement with the Administrative Office of the U.S. Courts regarding the confidentiality of certain documents.

II. Public Access to Commission Publications and Other Reports

Publications.—Official Commission publications are available to the public through the Government Printing Office or other administratively efficient means. Copies of all such documents are available in the Commission library for public review.

Other Reports.—Requests for statistical information regarding federal sentencing practices will be limited to published and/or Commission-approved reports. The reports produced from monitoring data collected by the Commission will be made available periodically and photocopies of such reports may be requested from the Commission. The cost of photocopied documents are the responsibility of the requestor.

III. Public Access to Commission Data

Comprehensive Datasets.—The Commission will create a comprehensive dataset on federal sentencing practices under the Sentencing Guidelines that will be made available for public use through the Inter-University Consortium for Political and Social Research. The dataset will contain a variety of information about the defendant (though not information which would identify him), the nature of the offense, and the sentence imposed. These datasets will be updated periodically with the addition of new cases.

From time to time the Commission, where appropriate, may also make available datasets of other non-confidential information which it has obtained in the course of conducting research, in support of policy development or in otherwise performing its functions. These datasets will also be made available to the public through the Inter-University Consortium for Political and Social Research

Source documents.—Source documents, in general, will not be available to the public. Much of the information contained within individual files is of a confidential nature and is protected by an agreement entered into by the Commission with the Administrative Office of the U.S. Courts.

IV. Public Access to Commission Minutes and Library Services

Commission Minutes. Approved minutes of Commission meetings are available for public inspection. Appointments to view the minutes must be coordinated through the Communications

Director. Photocopies of minutes are also available. The cost of photocopied documents is the responsibility of the requestor.

Library Services. The public is afforded full access to the library and the documents contained therein. Books and other documents and materials are available for use by the public and may be photocopied at the expense of the user.

V. Special Research Projects

Authority and Purpose.—Under 28 U.S.C. 995(a)(6)–(7), the Commission has authority to enter into “cooperative agreements [] and other transactions... with any person, firm, association, corporation, educational institution, or nonprofit organization” and to “accept and employ... voluntary and uncompensated services.” From time to time the Commission may enter into cooperative agreements with private researchers to undertake an analysis of sentencing data. The purpose of such agreements would be to further the Commission’s duty to “establish sentencing policies and practices for the Federal criminal justice system that reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process.” 28 U.S.C. 991(b)(1)(C).

Criteria and Requirements.—Cooperative agreements, when entered into, will involve formal arrangements with outside persons or organizations. All requirements with respect to preserving the confidentiality of information that are applicable to the Commission and its staff will apply equally to any party who enters into a cooperative agreement with the Commission. Proposals for cooperative agreements will be considered by the Commission in light of the following criteria:

- Whether the proposed research is sponsored by a recognized academic institution, non-profit research organization or government entity;
- The purpose of the research and extent to which the proposed project would advance the knowledge of human behavior as it relates to the criminal justice process; and
- The amount of data that is being requested and the administrative burden involved in providing such data.

Special Project Coordination and Feasibility. Proposals for special projects will be reviewed by the Staff Director, the General Counsel, and the Associate Director(s) of Research of the Sentencing Commission, or their designees, who shall report to the Commission on the feasibility and appropriateness of the proposal. The Staff Director shall ensure that a representative of the General Counsel’s Office and of the Probation Division of the Administrative Office of the U.S. Courts are consulted with respect to the proposed cooperative agreement as it may relate to the Commission’s obligations involving sentencing data.

Explanation

Section I

This section sets forth the statutory authorities under which the Commission adopted a policy on public access.

Section II

Publications.—This section refers to official Commission publications such as the *Guidelines Manual*, the *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements*, and the *Annual Report* that are currently available from the Government Printing Office (GPO). As new reports are produced and approved by the Commission for dissemination, they too will be made available through the GPO or other administratively efficient means. It is anticipated that the computer software developed to assist in application of the sentencing guidelines (ASSYST) will be made available to the general public through the National Technical Information Service.

Other Reports.—This section provides that materials other than official publications will only be made available to the public upon specific approval by the Commission.

Section III

Comprehensive Datasets.—This section provides that comprehensive datasets of sentencing information and, where appropriate, other information the Commission obtains through conducting research, in support of policy development, or in otherwise performing its functions, will be made available to the public through the Inter-University Consortium for Political and Social Research. Making information available in that manner is consistent with the policies of other federal agencies conducting or administering research related to sentencing and other criminal justice issues. Although the dataset will not contain information which would identify an individual defendant, it will contain a variety of information about the defendant, the nature of the offense, and the sentence imposed. Included will be variables identifying the circuit and district of the offense as well as demographic information about the defendant such as age, race, and sex. In addition, information about the defendant's prior criminal record, the statutes of conviction, and certain guideline indicators will be included in the file. Finally, information about the sentence imposed will be included.

Source Documents.—This section states that source documents will not be made available to the public. The Commission takes this position relative to source documents for two reasons. First, in June of 1988 the Commission entered into an agreement with the Administrative Office of the U.S. Courts concerning the appropriate treatment of confidential sentencing data.¹

This agreement places several limitations on the Commission in terms of the data collected by

¹ Letter from L. Ralph Mechem, Director, Administrative Office of the U.S. Courts, to Honorable William W. Wilkins, Jr., Chairman, U.S. Sentencing Commission, June 22, 1988.

representatives of the U.S. Courts and provided to the Commission:

- it permits the use of confidential information “only in connection with” the Commission’s “statutory duties;”
- it requires that “[n]o information that will identify an individual defendant or any other person identified in the sentencing information” be released outside the Commission without the express permission of the court for which the information was prepared and that public Commission reports or summaries containing sentencing information be free of confidential identifying information; and
- it requires the Commission to maintain administrative and physical security over the information and limits internal distribution of confidential sentencing information to Commissioner and Commission personnel with a “need for the information.”

It is imperative that the Commission operate both by the letter and the spirit of the agreement with the Administrative Office. The cooperation of the Administrative Office in the collection of the data is essential to the Commission’s ability to carry out its statutory mandate to “collect and disseminate information regarding effectiveness of sentences imposed.”

The second reason that the Commission is unable to make source documents available to the public relates to the physical and financial burden that such a policy would place on the Commission. In order to protect the confidentiality of information, photocopies of every non-confidential document would be required. Each photocopy would require inspection and removal of individual identifying information. Separate storage would be required for the desensitized documents in order to remove the potential of accidental availability of confidential documents or documents that contained individual identifiers. The Commission simply does not have the resources to provide such a service, particularly given that summaries of the information available from such source documents would be available through the dataset provided in the Inter-University Consortium for Political and Social Research.

Section IV

Commission Minutes.—Section 995(e) of title 28, United States code, requires that a record of votes of each member of the Commission be made available to the public. This policy is proposed in furtherance of that statutory requirement.

Library Services.—The Commission is assembling a library that will contain books, academic journals and articles, government reports and documents, reports of varied studies on federal sentencing, and bibliographic materials on selected topics related to federal sentencing. As part of its clearinghouse function, library materials are available for public review on Commission premises and for duplication at the user’s expense.

Section V

This section provides a formal structure under which the Commission may share information with outside researchers for mutually beneficial purposes. The Commission possesses the authority

under statute to enter into “cooperative agreements” with private individuals and organizations and to accept voluntary, uncompensated services. This section anticipates situations where the Commission may wish to cooperate with outside research organization in the interests of furthering “the advancement in knowledge of human behavior as it relates to the criminal justice process.” 28 U.S.C. § 991(b)(1)(C). It provides that such cooperative agreements be formal and that all requirements concerning the confidentiality of information be observed. Criteria for accepting a proposed project are provided. Further, a staff committee is required to assess proposals for feasibility and appropriateness. It is also required that certain offices within the Administrative Office of the United States Courts be consulted with respect to any questions concerning the Commission’s obligations involving the confidentiality of sentencing data as they may relate to a proposed cooperative agreement.

Agreement Concerning the Confidentiality of Certain Sentencing Information

Introduction.—The agreement between the Administrative Office of the United States Courts and the United States Sentencing Commission was memorialized in the following letter between L. Ralph Meham, Director of the Administrative Office and Judge William W. Wilkins, Jr., Chairman of the Commission. The letter is dated June 22, 1988, and became effective when countersigned by Judge Wilkins on July 21, 1988. The letter follows:

June 22, 1988

Honorable William W. Wilkins, Jr.
Chairman, United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Washington, DC 20004

Dear Judge Wilkins:

On March 7, 1988, I notified the courts of the documentation needed by the Sentencing Commission to perform its statutory duty of monitoring sentences imposed under the provisions of the Sentencing Reform Act. My memorandum noted that a general agreement protecting the confidentiality of presentence reports would be entered into by the Commission and the Administrative Office. Since my memorandum, the General Accounting Office has requested access to presentence reports and other documents from the Commission. This request required agreement with the GAO on the protection of the confidentiality of presentence reports and coordination with your Research Division on how to honor requests that certain information not be forwarded to the GAO. Now that these arrangements have been made we can execute an agreement on confidentiality. I understand that an agreement has been worked out by our respective General Counsels.

Accordingly, I understand that the United States Sentencing Commission agrees to maintain the confidentiality of sentencing information transferred to the Commission through the assistance of the Administrative Office as follows:

- (1) The sentencing information will be used only in connection with the statutory duties of the Commission as set forth in chapter 58 of title 28, United States Code.
- (2) No information that will identify an individual defendant or other person identified in the sentencing information will be disclosed to persons or entities outside of the Commission without the express permission of the court for which the information was prepared. However, this

restriction does not prohibit disclosure of sentencing information to the General Accounting Office unless an individual court has identified a particular case as to which the court has requested that sentencing information not be disclosed to the General Accounting Office.

(3) The Commission will maintain administrative and physical security of the sentencing information in order to provide a reasonable assurance against accidental or deliberate disclosure to unauthorized persons.

(4) Access within the Commission to the sentencing information will be limited to commissioners and to those employees^{%%} who have a need for the information for the purposes set out in chapter 58 of title 28, United States Code, and the commissioners and such employees will be advised of and agree to comply with the provisions of this agreement.

(5) Any reports, findings or other summaries of the sentencing information that will become accessible to the public will not contain information that can reasonably be expected to lead to the identification of an individual defendant or other person identified in the sentencing information.

Please acknowledge acceptance of these conditions by signing a copy of this letter and returning it to the undersigned.

Sincerely,
L. Ralph Mecham
Director

Dated: July 21, 1988.

Agreed to as outlined above:
William W. Wilkins, Jr.
Chairman, Sentencing Commission

^{%%} As used in this document, the term "employees" includes all persons employed or retained by the Commission, including, but not limited to, contractors, consultants, temporary and part-time employees, and volunteers.